No. 88-2137

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

MICHAEL MCMONAGLE, et al
Petitioners

v.

NORTHEAST WOMEN'S CENTER, Inc.
Respondent

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION AND APPENDIX

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I. INTRODUCTION

Respondent's brief in opposition only serves to underscore the need for review of this case.

A. The split among the circuits created by this case is beyond dispute

Respondent concedes that the decision below "is at odds with *United States v. Ivic.*, 700 F.2d 51 (2d Cir. 1983)." (Resp. Br. 24). Indeed there is no question that the Third Circuit's unprecedented and dangerous ruling conflicts sharply with Second and Eighth Circuit decisions holding that RICO does not apply where neither the alleged enterprise, nor the pattern of racketeering activity contain any economic or profit-making elements.[1] The decision is also utterly irreconcilable with Congress' plainly stated intent that RICO apply *solely* to crimes adapted to *commercial exploitation* (Petition 18-23).

Despite the fact that the Second and Eighth Circuit RICO decisions and petitioners' briefs below contain an exhaustive analysis of the legislative history of RICO[2] which leads inexorably to the conclusion that RICO does not apply to petitioners' conduct, both the Third Circuit opinion and respondent's brief studiously avoided any discussion or analysis of RICO's legislative history and with good reason – Respondent's RICO claim simply will not withstand analysis of the statute and its legislative history.

B. This case presents an appropriate record for consideration and resolution of the issues raised by the petition

Nothing in respondent's Brief or in the record supports respondent's assertion that this case fails to present an appropriate record for consideration of the issues raised in the Petition. (Resp. Br. 16).

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1. *United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir. 1988) *cert. denied*, 109 S. Ct. 511 (1988); *United States v. Ferguson*, 758 F. 2d 843 (2d Cir. 1985) *cert. denied* 474 U.S. 102 (1985); *United States v. Bagaric*, 706 F. 2d 42 (2d Cir. 1983) *cert. denied*, 464 U.S. 840 (1983); *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983).

2. Petition 10-11, 18-23.

With respect to the fourth issue presented in the petition it should be noted initially that petitioners did not base their arguments concerning the proper definition of extortion exclusively upon error in jury instructions. Petitioners also contended that since the evidence showed that they neither appropriated to themselves nor any related third party any tangible or intangible property, it was apparent upon completion of plaintiff's case that a directed verdict should have been entered for petitioners on plaintiff's claim of Hobbs Act extortion. (Petition 25). Petitioners' motion was denied. (Petition 6, Pet. App. 94-96 and 261-67). *See also*, argument on motions for directed verdict. (Reply App. 1-4)

Respondent's statements that it included all of petitioners' proposed points for charge in its appendix (Resp. Br. 15, n.16) and its contention that the petitioners' proposed points for charge were at odds with the issue raised in Section IV of the petition are both absolutely erroneous. Respondent's statements are astonishing given the numerous motions filed with respect to this very issue and counsels' vigorous arguments with respect thereto (Petition 25-28, Pet. App. 88, 261-67 and Reply App. 1-13). Respondent chose to omit from its appendix all of petitioners' supplemental points for charge on extortion, which petitioners have included in the appendix hereto.

During the course of its deliberations the jury requested that the definition of extortion be clarified. The trial court's proposed response to the jury's request prompted objections by all of petitioners' counsel including the following:

> the property can't just be surrendered to be appropriated by the alleged extortee [sic] third person. The impression is left from this instruction that if somebody surrendered something, including an intangible property right, that's all that's necessary. There has to be a showing something was appropriated, by the person committing the extortion or then transferred to a third party and that is the problem I have with this instruction. It leaves the instruction if somebody surrendered something that [sic] all that's necessary.

(Petition 26, n.29 *quoting* N.T. 16-2). Petitioners' counsel then proffered the standard New York jury instruction set forth in Pet. App. 163 and in Reply App. 6. At the same time counsel for petitioners also filed with the court a Memorandum to the Trial Judge Sur Jury Deliberation Question (Doc. No. 183) and a Motion to Correct Defect in Jury Instructions (Doc. No. 183) addressing the definition of extortion (Reply App. 7-13). The precise issue raised before this court in Section IV of the Petition could not have been more clearly framed or addressed below.

Respondent's contention with respect to the appropriateness of the record for consideration of First Amendment issues is also without merit. Petitioners raised the First Amendment as a defense numerous times in both their pleadings, and in argument before the lower court.[3] The district court addressed at length both the general application of the First Amendment to this case (Pet. App. 91-96) and this Court's *Claiborne* decision (Pet. App. 93), and the Third Circuit also addressed (albeit incorrectly) the application of the First Amendment to this case. (Pet. App. 12-16). The application of *Claiborne* to this case was also the subject of a Petition for Rehearing In Banc in 88-1333, which was rejected by the Third Circuit. (Pet. App. 33). Contending that the courts below were blissfully unaware of the important First Amendment issues raised by the extension of RICO's "drastic remedies"[4] to the political arena is disingenuous at best. The issue has been preserved and is properly before this court.[5]

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3. *See e.g.* Defendants Answer to the Complaint, Defendants' Pretrial Memorandum, and argument during the preliminary injunction hearing, and numerous times during the course of the trial with respect to the admission of evidence of conduct of non-defendants as the basis for the Hobbs Act extortion.

4. *H. J. Inc. v. Northwestern Bell Telephone Co.*, 57 U.S.L.W. 4951 (June 26, 1989).

5. Even if respondent's position had some basis in fact, it has long been the position of this Court that it will consider questions passed upon by the courts below, although not, or not properly raised by the parties, *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970); *Sabbath v. United States*, 391 U.S. 585 (1968); *Jones v. United States*, 362 U.S. 257 (1960); *Mallett v. North Carolina*, 181 U.S. 589 (1901).

Further, as is more fully discussed below, respondent's summary of the evidence and testimony contains numerous deficiencies: respondent repeatedly *attributes to the petitioners alleged conduct the perpetrators of which are unknown or unidentified by respondent or its witnesses,*[6] portrays as factual findings that which is merely the testimony of interested witnesses and omits conflicting evidence and testimony presented by petitioners below which dramatically alters the inferences respondent hoped to create. While petitioners have detailed a number of these deficiencies in Section II *infra,* ultimately respondent's attempts to obfuscate the important constitutional and statutory questions by presentation of erroneous factual assertions presented herein are largely irrelevant for two reasons.

First, even if the facts were exactly as respondent states them, respondent *still* would not have proven a Hobbs Act extortion or a RICO violation. *Second,* petitioners and respondent are in agreement with respect to those facts relevant to consideration of the issues raised in the petition for certiorari and necessary for this Court's resolution of those issues.[7]

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6. Respondent's attribution to defendants of actions taken by non-defendants is not a novel tactic. As was discussed in petitioners' original submission, substantial portions of the evidence presented in this case consisted of activities engaged in by non-defendants which were admitted into evidence over petitioners' objections on the ground that the non-defendants were members of the same political organization as certain of petitioners. (Petition 5 and, e.g. Pet. App. 167-72).

7. As evidenced by testimony set forth at length in the appendix accompanying the petition, respondent's witnesses testified and respondent does not dispute that its suit followed hundreds of protests during the nine year period from 1976 through the time this action was commenced. Respondent and petitioners agree that there were indeed incidents during some of the demonstrations at the respondent's place of business which went beyond conduct protected by the First Amendment. Petitioners detailed a number of these incidents (*see e.g.* Petition 3, nn.2, 3) and framed each of the issues they are requesting this Court review on the *assumption* that there was illegal conduct.

C. This case undeniably involves issues of broad national importance

The broad national significance of the lower court's rulings is highlighted by the flood of RICO actions against political protesters spawned by the Third Circuit's decision.[8] These actions, brought against political protesters by municipalities seeking to recover the costs of arresting protesters and picketers, by rival political organizations holding views diametrically opposed to those of the protesters and by abortion clinics, each rely exclusively upon the Third Circuit's decision in this case to fashion relief which can only be characterized as trampling First Amendment freedoms and wreaking havoc with both RICO and the Hobbs Act. That the course taken by the Third Circuit must be corrected is undeniable.

II. Respondent's Counterstatement of Facts

It is impractical to attempt a complete cataloguing of each of the inaccuracies concerning the record set forth in respondent's brief, however the following examples are instructive in

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8. *See e.g.,* the following actions which have been filed since the filing of the petition, and which are in addition to those cited in note 10 of the petition, *Town of West Hartford v. Operation Rescue et. al.,* No. 89-400-PCD (D. Conn., filed June 29, 1989) (RICO action by municipality against various individuals, political organizations, and the editor of a local newspaper (alleging that he had supported the illegal protests by editorializing in favor of them) and alleging extortion based on organization of or participation in sit-ins and seeking to recover the personnel costs incurred by the municipality in arresting protesters); *West Carolina Medical Clinic, Inc. v. Operation Rescue,* et al., No. AC-89-140 (W.D.N.C., First Amended Complaint filed August 18, 1989) (RICO action against 40 individual protesters alleging Hobbs Act extortion of the plaintiff's intangible right to conduct its abortion business based upon protests and sit-ins); *Volunteer Medical Clinics, Inc. v. Operation Rescue et al.* No. 89-3-89-156 (E.D. Tenn., Amended Complaint filed June 1, 1989) (RICO action against 105 individual protesters alleging Hobbs Act extortion of the plaintiff's intangible right to conduct its abortion business based upon protests and sit-ins); *Birmingham Women's Medical Center, Inc. v. Operation Rescue and Liberty Church et. al.,* No. C.V. 89-P-1261-S (N.D. Ala., filed July 29, 1989) (RICO action against church and 60 individual protesters alleging Hobbs Act extortion of the plaintiff's intangible right to conduct its abortion business based upon participation in and advocacy of protests and sit-ins).

assessing the strength of respondent's case.

Respondent stated as fact, although no factual finding to such effect had been made, that on December 8, 1984, 12 of the Petitioners "in order to enter the clinic, . . . knocked down and ran over the clinic's administrator." (Resp. Br. 3). Examination of the notes of testimony referenced by respondent indicates that the administrator testified that she was knocked down but *failed to identify who was responsible for the alleged incident, or whether indeed it was any one of the petitioners or some other third party.* This is of course dramatically different than the inference which respondent wanted to create, i.e., that the only way for petitioners to have gained entry on December 8, 1984 was to knock over the administrator.[9]

Concerning the October 19, 1985 demonstration, respondent states that a defendant "grabbed" the clinic administrator and "attempted to pull her down, but she (the administrator) escaped back into the clinic." Respondent's citation to the record again indicates that Respondent's portrayal of testimony was inaccurate. Specifically, the administrator testified that "someone began "pulling" on her . . . "trying to pull me down". She then testified that "I resisted and pulled back."

9. Respondent focuses on the alleged actions of a single defendant who, according to testimony presented by respondent, opened a door in such a way that a staff member was struck with the door. The idea of course is to portray all of the defendants as being violent and dangerous, an assertion which is not supported by the record. Concerning the August 10, 1985 sit-in, respondent states, again as if a factual finding to such effect had been made, that the 12 petitioners involved with that incident injured two staff members. This statement was based upon nothing more than the testimony of a third staff member who testified at trial. Respondent did not call as witnesses those staff members allegedly injured at the time of the trial. If it can be proven that any protester did injure a staff member or any other person, such protester would be liable for assault or battery. However, such allegations cannot serve as evidence that petitioners committed Hobbs Act extortion as to the respondent. Respondent also states that two defendants, also on October 19, 1985, told patients in the plaintiff clinic that "Jews lie!, Jews lie!" Incredibly, respondent neglects to state that the same defendants whom respondent has once again maligned and slurred "categorically denied ever having made such patently offensive statements." Defendants Memorandum of Law In Support of Pre-Trial Motion In Limine 1-2.

This witness never stated that she "escaped back into the clinic". More importantly, *the administrator never identified who it was that allegedly attempted to pull her down outside the clinic* – was it one of the defendants or was it some third party demonstrating at the clinic on that day?

III. The "Precision of Regulation" Demanded By Claiborne Hardware Is Lacking In This Case

Much of the evidence upon which both respondent and the Third Circuit rely so heavily for the assertion that petitioners engaged in Hobbs Act extortion does not distinguish between conduct which is protected by the First Amendment, and that which was illegal and outside the protection of the First Amendment. As an example, both the Third Circuit (Pet. App. 17) and respondent (Resp. Br. 2) relied upon language contained in fund-raising letters written by petitioner McMonagle in support of a finding that petitioners committed Hobbs Act extortion. Noting that respondent's administrator had attributed the non-renewal of respondent's office lease to protests at the clinic, McMonagle stated that the lease was not renewed "because of the prayers and protests of Pro Life citizens." (Resp. Br. 2). What activity would respondent have the Court believe resulted in non-renewal of the lease and evidence of Hobbs Act extortion? Prayers or "protests"? If the latter, was the non-renewal of the lease attributable to the hundreds of entirely legal, First Amendment protected protests which occurred every Wednesday, Friday and Saturday for a period of several years outside the respondent clinic, or solely to the sporadic illegal conduct?

Surely the answer cannot be discerned from the fundraising letter, or from the testimony of respondent's witnesses. No testimony of the landlord or its representatives was presented at trial as to whether the landlord refused renewal of the lease as a result of the protests or for some entirely unrelated reason. Respondent's reliance upon such "evidence" for a finding of Hobbs Act extortion and RICO liability is but one example of its failure to comprehend the "precision of regulation" required by this Court's decision in *Claiborne Hardware.* (Petition 13-17).

IV. Respondent's Remaining Arguments Do Not Dispel the Direct Conflict With the Second and Eighth Circuits

Contrary to respondent's assertions (Resp. Br. 23-24, neither *H.J. Inc. v. Northwestern Bell Telephone Co.*, 57 U.S.L.W. 4951 (June 26, 1989) nor *Sedima S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 498 (1985) weaken the Second and Eighth Circuit's interpretation of RICO or its legislative history, as in both cases the crime charged was classically economic in nature and merely continued the tradition of applying RICO to crimes having an economic dimension.

What both *H.J. Inc.* and *Sedima* do stand for, however, is the proposition that sound interpretation of RICO requires both an analysis of the language of RICO and its legislative history. *H.J. Inc.* at 4952-53, *citing Sedima* at 486-90 (Court opinion), 510-519 (Marshall, J., dissenting), 524-527 (Powel, J., dissenting); *Russello v. United States*, 464 U.S. 16, 26-29 (1983); *United States v. Turkette*, 452 U.S. 576, 586-587, 589-593 (1981). Yet, rather than engage in an analysis of the statute itself and its legislative history, both respondent (Resp. Br. 23-24) and the Third Circuit (Pet. App. 12) rely exclusively upon this Court's observations in *Sedima* regarding the breadth of the RICO statute as if it was meant to dispense with the need for analysis and a thinking approach to its application. If federal courts take this view, then the rule for all RICO actions will be simply "he who files first, wins" and, as in this case, RICO means anything inventive plaintiff's counsel defines it to mean.

V. There Is No Standing To Base a RICO Violation On Predicate Acts To Others Having No Resultant Harm

Respondent's suggestion that there is nothing remarkable in permitting the extortion of its employees to serve as predicate acts for its claimed RICO violation ignores the lower court's admission that resolution of the issue presented by petitioners "raises a novel question regarding the predicate acts requirement of RICO" (Pet. App. 89 n.11) and begs the question. Where there is no injury to the third party against whom the conduct is directed, there is no vicarious harm to another by virtue of that predicate act. Respondent admits it has not been

damaged by the extortion of its employees. (Resp. Br., 26, n.30). The jury found that the only RICO injury suffered by the respondent was $887 in property damage during the sit-in of August 10, 1985 (Pet.App.10, 257-58). Although the jury found that petitioners had interfered with the contractual relations of the clinic's employees (co-extensive with the RICO "extortion" of their right to continued employment), the jury found *no damages had resulted therefrom.* (Pet.App. 260). The jury nevertheless based RICO liability upon extortion of the employees as one of the two predicate offenses on which to base the RICO violation. (Pet.App 255-256). This directly conflicts with this Court's decision in *Sedima* that the plaintiff has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation. *Sedima*, 473 U.S. at 495.

VI. Review By This Tribunal Is Warranted When the Court Below Deems Conduct To Be Extortionate and In Violation of the Hobbs Act, 18 U.S.C. §1951 Even Though the Alleged Perpetrator, Or A Related Third Party, Neither Obtains Nor Attempts To Obtain Any Tangible or Intangible Property

The property which respondent maintains was extorted by petitioners is its intangible right to "operate its business and make decisions freely." (Resp. Br. 28) Respondent does not address petitioners' central contention that a Hobbs Act extortion is not established absent a showing that the defendant (or a related third party) either acquired or attempted to acquire tangible or intangible property.[10] Respondent's assertion that the requirement of "obtaining property" is fulfilled because petitioners and others engaging in political protest might have felt personal relief if respondent stopped performing induced abortions (Resp. Br. 28, n.32) merely serves to underscore the

10. Respondent attempts to obfuscate the issue by raising an unrelated contention which was not raised in the Petition. Petitioners concede there is ample authority for the proposition that intangible property may be extorted under the Hobbs Act. The cases which respondent cites as authority for this proposition (Resp. Br. 28) simply reiterate a point which is not raised in the petition. (Petition 25-28).

extraordinary breadth of the decision below, and its extension of RICO's grasp into the nation's political arena. Clearly, no economic advantage or power can be identified in this context.[11]

VII. Review By This Court Is Entirely Appropriate When A Federal Court of Appeals Renders A Decision Conflicting With Both Its Own Precedents and Those Of Other Federal Courts of Appeals On the Same Matter

Petitioners contended in their post trial motions, and on appeal in the court below, that the district court's charge on trespass damages was incomplete and misleading. Respondent answered these contentions, on the merits, without claiming waiver.

Petitioners, in their briefs, twice advised the Third Circuit that a written point for charge outlining the correct measure of damages for common law trespass had been submitted to the district court which it had declined to provide to the jury. See Main Brief of Petitioner Juan Guerra, et. al. at No. 88-1336, 40 and 42. Thus, the lower court was advised by petitioners how and when their challenge to the lower courts' charge on trespass was preserved.[12] The lower court's statement that petitioners failed to provide the lower court with a reference to the record

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11. Respondents do not cite a single case which stands for the proposition that extortion can be proven absent a showing that the perpetrator obtained or sought to obtain property of another. Respondent's reliance upon *United States v. Local 560,* 760 F.2d 267 (3rd Cir. 1985) is misplaced since defendants in *Local 560* intimidated union members into giving up their statutory right to participate in union affairs which thus clearly provided defendants with an identifiable economic advantage by enabling defendants to acquire control of the Local. No such economic advantage is identifiable in the matter *sub judice.* The appropriation of an economic benefit is readily ascertainable in each of the other cases relied upon by respondent as well.

12. Petitioners did not elaborate on the waiver issue in their Main Briefs since respondent declined to assert waiver until it filed its second brief with the lower court and had never asserted such a claim in the district court. Petitioners waiver claim itself was thus untimely.

In addition to refusing to provide the jury with the correct instruction on the measure of damage for trespass, the district court also declined to rule upon petitioners' proposed point on trespass damage.

wherein the issue had been preserved is shockingly incorrect. The cases cited in Section V of the Petition amply demonstrate the conflict in the circuits, which respondent has failed to address or refute.

CONCLUSION

For the reasons stated above and in the petition for certiorari, petitioners respectfully request that the petition for writ of certiorari be granted.

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APPENDIX

EXCERPTS FROM NOTES OF TESTIMONY

* * *

[11-62]

MR. SHORT: My own position on the extortion, there has to be a thing of value exacted, that the statutes concerning extortion, specifically statutes concerning extortionate picketing all come from the labor management relations act in the labor relations field. To give you some type of background about what extortionate picketing is. Extortionate picketing and extortionate protest activity of that nature is described in Section 602 of the Labor Management Relations Act. "It's unlawful to carry a picket on or about the premises of an employer for the purpose of or as part of a conspiracy in the furtherence of any plan or purpose—" The key word, "personal profit or enrichment of any individual by taking or obtaining any money or one other [sic] of value from such employ against his will or without his consent." So the purpose of that is [11-63] obtaining property for one's own enrichment and the value that's being exacted is the employment relations between the individuals and maybe the loss of income and he mentioned is his three theories. The point is that is does not fall within extortion when you have to prove in RICO, when you have to plead and prove an act, a crime. He pleads extortion. He has to prove a common law extortion and again, the heart of that is exacting something for the personal enrichment of the individual.

In this case, the individuals, if they are exacting anything, if there is that pattern of activity to show they are exacting anything, it's not personal financial enrichment. There is an enrichment, a savings in their mind that has been expressed or could be inferred from the evidence that would be satisfied if they obtained the ceasing of abortions being performed by the Northeast Women's Center, but there is no pressure or threat to exact the compensation, that pecuniary gain, that profit, that thing of value.They are stating the thing of value is their loss of this employment relationship. That fits into your pendant state claim and your business tort, but the purpose of RICO—of

addressing these things, the focus of RICO and the Congressional focus which still has not been thrown out, is to combat the use of RICO as a business tort activity. The focus is on economic advantage obtained through the fruits of racketeering activity. So, the [11-64] extortion has to fit the RICO purpose and it's just not here. The extortionate activity, if he wants to argue in general a theory as it affects his business tort claim, we can do that whether [sic] we get onto that topic and I am not giving that up. It's not there for the purpose of RICO activity and the exacting of economic gain.

THE COURT: Supposing I extorted something from you and just said unless you give a contribution to the University of Pennsylvania, I am going to picket you. I am a fund raiser. I am an alumni of the University of Pennsylvania and I want to see them prosper. I am doing it because I think the University of Pennsylvania ought to have all the money that it needs and wants and you are a businessman, unless you give something to somebody else, I am going to picket you and I am going to use extortionate means to do it. What are your thoughts on that?

MR. SHORT: As far as extortionate picketing, that would fit under the labor management relations act.

THE COURT: Forget whether it's picketing. It's not labor related. I am going to call you everything in the world. I am going to say you buy foreign goods and [sic] put American workers out of work. There is no business relationship between us.

MR. SHORT: You are not going to stop until I give up something of value to somebody else?

THE COURT: Yes [11-65]

MR. SHORT: In that case you are exacting an economic gain, but here, you are not exacting an economic gain.

THE COURT: Well, the theory of the plaintiff's which I am anticipating, is that your group has put such effort, as I understand it, on the part of the plaintiff, that they have either had to circum [sic] to your pressure or willingly go out and hire security guards, extra security, which is what they have voluntarily given up. That's just my general thinking on it. So this is something they gave up and this is the $49,000.

MR. SHORT: If they prevail on the business tort.

THE COURT: They also say it's extortion.

MR. SHORT: That's not correct.

THE COURT: That's the theory of what they are giving up. It's not coming back to you.

MR. SHORT: They are taking a dollar amount on what they gave up. The security costs and they are putting a dollar amount on it and saying this is what we had to give up on response to their activities?

THE COURT: Right.

MR. SHORT: The thrust an [sic] purpose of extortion, you have to prove a common law term, to exact something of value, specific intent. Extortion is a specific intent crime. You have to prove it.

THE COURT: The value in this situation is for them to stop performing abortions, that's what you want. [11-66]

MR. SHORT: That's not what they gave up.

THE COURT: You are trying to get them to give it up. This is attempted extortion. Maybe I am speaking too much on the part of the plaintiff in this case.

MR. SHORT: It's not an economic advantage. You have to look at the purpose of the RICO Act. They want to get the District Attorney to prosecute an extortion—

THE COURT: They are not required to do that under RICO.

MR. SHORT: They're not.

THE COURT: They are alleging robbery but they don't have to have somebody convicted of robbery.

MR. SHORT: But they have to prove the elements within this action here.

THE COURT: I understand that. I agree with you. They have to prove it. What's your theory.

MR. TIRYAK: I think the principal problem in the analysis that you just heard is that the Labor Relations Act is not one of the statutes that's listed. It's the Hobbs Act and that's extortion we're talking about. The Hobbs Act makes it clear that extortion, whoever, in any way or degree obstructs or delays or after

effects commerce, does not have to show anything else.The case on point is the Harry Janotti.

[11-67]

case, where the argument was that nobody was ever going to give him any money. The whole thing was a scam. There couldn't have been an extortion because he couldn't have gotten any value and the Third Circuit said that does not matter. Attempted extortion counts. We have cited in our brief and I haven't heard anything replace to these cases, the Cirillo case, a Third Circuit case, which makes it clear that the person who is committing the extortion does not have to be getting a thing of value, and in fact, in a typical extortion situation, the guy that is going out to strong arm somebody is not the person that's going to get the money. That's almost always the circumstances in an extortion.

MS. CONNELLY: Can I read that section that I have been trying to read, from the Hobbs Act, Section 1951(B) (2): "The term, 'Extortion' means the obtaining of property from another with his consent induced by wrongful use of actual or threatened force, violence, fear or under color of official rights." That "extortion" is and that's not what Mr. Tiryak said it was.

[16-2]

(Whereupon, the following transpired at sidebar with all counsel being present:)

THE COURT: I am going to send the definition of extortion out and I am going to allow counsel to write up what they think the robbery is and I will decide that later, but at least we can send the extortion one out.

"Mr. Stanton: Your Honor, I have a comment on the extortion [instruction]. I am looking at the jury instruction from New York, New York Standard Criminal Jury Instruction on extortion and it does say that the property can't be just surrendered. The property has to be appropriated by the alleged extortee [sic] third person. The impression is left from this instruction that if somebody surrendered something, including an intangible property right, that's all that's necessary. There has to be a showing something was appropriated, by the person committing the extortion of then transferred to a third-party and that the problem I have with this instruction. It leaves the instruction if somebody surrendered something that [sic] all that's necessary."

MR. SHORT: This leaves out the intent portion that you read when you gave the jury charge.

MR. TIRYAK: This is a Hobbs Act extortion. It has nothing to do with New York law and New York jury instructions and it's clear under the Jannotti case, there was nothing to be extorted, because the entire operation was a scam, this is the [16-3] same instruction you gave. We have already made arguments about it.

* * *

DEFENDANTS EXHIBIT S-5 POINTS FOR CHARGE ON EXTORTION FROM NEW YORK STANDARD JURY INSTRUCTIONS

EXTORTION

Under the law, a person is guilty of extortion if he obtains property from his victim, who must also be the owner of the property, through the use of fear and in so doing affects Interstate Commerce.

A person does not obtain property unless he has the intent to appropriate the property. Appropriate means to permanently or for an extended period of time exercise control over the property. Intent to appropriate means that the defendant must have a conscious aim or objective to appropriate the property to himself or to another.

Examples of "through the use of fear" would include threats to cause physical injury or threats to damage another's property.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORTHEAST WOMEN'S CENTER, INC.	:	
vs.	:	CIVIL ACTION
MICHAEL McMONAGLE, et al	:	NO. 85-4845

MEMORANDUM TO THE TRIAL JUDGE SUR JURY DELIBERATION QUESTION

ISSUE: What response to give to jurors when, after a day and one-half of deliberations, the foreperson requests a definition of "Robbery under RICO" and "Extortion under RICO"?

DISCUSSION: Upon a request by the jury marked Court Exhibit C-11, the Trial Judge sought comments of counsel. Counsel were unable to agree. The definition of crimes under RICO can either be according to state law or according to other definitions specified under assorted federal laws. Here, the Plaintiff has elected to proceed and allegedly prove its case according to the definition of crimes in The Hobbs Act. In the Court's initial charge on May 11, 1987, the Trial Judge issued a charge consistent with the Hobbs Act definitions. Now, upon the Jury's request, the Court has proposed an instruction on Extortion that also includes unsolicited instructions on the definition of property. The wording of the proposed instruction unduly gives credence to Plaintiff's theory of the case and is worded in such as a way as to give a conclusive or mandatory instruction to the jury. Defense counsel object and request a more example free instruction such as the one set forth in Slatzburg-Perlman's publication on jury instructions. As example follows on page 2.

PROPOSED ANSWER:

EXTORTION: To find that a person is guilty of extortion under the law as it applies to this case, you must believe beyond a preponderance of the evidence that three things are true:

1. A person obtained or conspired to obtain money or something of value from the person of The Northeast Women's Center with the Northeast Women's Center's consent; and

2. The person obtained this consent by threatening to injure the Center or its property in some way; and,

3. The person's actions in some way, however slight, interfered with, delayed or affected the flow of business activities of the Center or the movement of any article or thing between two or more states.

ROBBERY: This defense counsel has no objection to the proposed answer of the Court. The answer drafted by the Court is consistent with the prior charge and is example neutral. It answers as clear and as concise as is practical.

Respectfully submitted

Thomas J. Short, Esquire
Attorney for Linda Corbett, Pat McNamara, and Thomas McIlhenny

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORTHEAST WOMEN'S CENTER, INC. *Plaintiff*	:	CIVIL ACTION
vs.	:	
MICHAEL McMONAGLE, et al *Defendants*	:	NO. 85-4845

MOTION TO CORRECT DEFECT IN JURY INSTRUCTIONS REGARDING PLAINTIFF'S RICO COUNT

Respectfully submitted,

Charles F. Volz Jr., Esq.

MOTION TO CORRECT DEFECT IN JURY INSTRUCTIONS REGARDING PLAINTIFF'S RICO COUNT

Charles F. Volz Jr., Esquire, on behalf of the several defendants he represents in the instant matter, hereby requests that this Court issue the following curative instructions in response to the jury's request for the definition of robbery and extortion, and states in support thereof:

1. In the Amended Complaint filed by the Northeast Women's Center, the plaintiff claimed the predicate offenses of extortion, robbery, mail and wire fraud. Amended Complaint, ¶55.

2. The predicate offenses of mail fraud and wire fraud were not pursued during trial.

3. At no time did the plaintiff plead attempted robbery and attempted extortion as predicate offenses. At no time did the plaintiff plead conspiracy to commit robbery or conspiracy to commit extortion.

4. Section 1961 of the RICO act defines "racketeering" activity to mean "any act or treat involving . . . robbery . . . extortion. The act itself does not make the attempt to commit robbery and/or extortion predicate offenses.

5. Plaintiff's claim for relief pursuant to the RICO statute, ¶¶80 through 83 was limited to the predicate acts alleged, i.e., robbery and extortion, and was therefore confined to §1962(c). Plaintiff never plead a conspiracy to violate RICO pursuant to §1962(d).

6. Plaintiff only plead a conspiracy in ¶84, pertaining to the alleged violations of the Sherman Antitrust Act.

7. Under the RICO law, only the government could alleged a conspiracy or attempt to violate the Hobbs Act as a predicate offense, a private litigant cannot. Pursuant to §1964(b), the "attorney general may institute proceedings under this section" and there is no requirement of harm,

damages, or injury. §1964(c) establishes a private cause of action only for "any person injured in his business or property by reason of a violation of Section 1961 . . ." The language of the Act and the holding of *Sedima* prohibit a private civil litigant from alleging a conspiracy or attempt to violate the Hobbs Act as a predicate offense because, by definition, a conspiracy or attempt would have no impact on his business or property. Therefore, this plaintiff cannot rely on inchoate crimes as predicate offenses on Section 1962(d).

8. Despite the aforesaid, this Court gave the jury a charge containing attempted robbery and attempted extortion as predicate offenses.

9. Additionally, this court presented the jury with Interrogatory No. 4, which pertains to a conspiracy, which this plaintiff lacks standing to assert. Also, compounding the error in Interrogatory No. 4 is Interrogatory No. 5 which deceptively refers to one overt act, but which should at least speak to one overt act to commit each of the required two predicate offenses.

10. As the jury has propounded a question concerning the definition of robbery and extortion, it is not too late for this court to issue the curative instructions suggested herein.

ROBBERY

One of the acts of racketeering activity alleged committed by these defendants is that of robbery concerning the 8/10/85 incident at the Northeast Women's Center. In order to establish the crime of robbery, the plaintiff must prove each of the following six [6] elements by a preponderence of the evidence:

(1) that the defendants forcibly took and carried away

(2) with the specific intent to steal

(3) the personal property of the Northeast Women's Center

(4) taken from the person or another by violence or putting in fear

(5) with the intention to permanently keep the property so taken.

(6) and that in so doing interstate commerce was adversely affected.

An attempt to commit robbery is insufficient to establish the crime of robbery.

[*U.S. vs. Nedley*, 255 F.2d 350, 357 (2d Cir. 1958)]

EXTORTION

One of the acts of racketeering activity alleged committed by these defendants is that of extortion. In order to establish the crime of extortion, the plaintiff must prove the following three [3] elements by a preponderence of the evidence:

(1) that the defendants induced or caused the Northeast Women's Center to part with property;

(2) that the defendants obtained the property of the Northeast Women's Center with its consent, induced by the wrongful use of actual or threatened force, violence, or fear, and

(3) that is so doing, interstate commerce was delayed, interrupted or adversely affected.

An attempt to commit extortion is insufficient to establish the crime of extortion.

[§56.04 Fed. Jury Practice, Devitt & Blackmar]

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PROPOSED EXAMPLE FOR JURY AS TO ROBBERY AND EXTORTION

(taken from 91 Cong.Rec. 11911 (1945), in the debates over the Hobbs Act)

A farmer with a load of produce – milk, butter, eggs, vegetables, potatoes (things he has raised and produced upon his farm and which he owns) – approaches a state line in going to the market. His wife and his children accompany him. He is stopped by a group of individuals who demand that he stop his truck and pay them $9.00 if he wants to cross the line and get to the market. The farmer states that he doesn't want to pay the $9.00. The group of individuals state that if he doesn't pay the $9.00, they will knock him in the head, or knock his wife or children in the head. Fearing for his own well being or that of his wife or children, the farmer pays the $9.00. This is the example of a robbery.

If his wife and children were not with him, but the farmer nonetheless feared for their safety and voluntarily parted with the $9.00, this would be an extortion.

Respectfully submitted,

Charles F. Volz Jr., Esq.